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No. 03-485

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent does not dispute the nature of the Ninth Circuit's holdings in this case, only their importance. Invoking the presumption against extraterritorial application of United States law in order to limit Executive Branch authority, the Ninth Circuit held that DEA agents—although charged with enforcing laws that expressly apply to conduct outside the United States—lack statutory enforcement authority beyond the Nation's borders, even when acting with a foreign nation's consent. In the same opinion, however, the Ninth Circuit ignored that presumption so as to expand judicial authority. Refusing to give effect to a textual prohibition against adjudication of "any claim arising in a foreign country" under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(k), the Ninth Circuit held that federal courts can review officer conduct alleged to be tortious *solely because* it took place abroad. Both holdings portend serious and ongoing interference with the Executive's ability to enforce the law and conduct foreign affairs.

Respondent does not seriously defend the Ninth Circuit's highly selective application of the presumption against extraterritoriality. See Pet. 29-30. Nor does respondent attempt to reconcile it with the Constitution's allocation of authority among the Branches. The Constitution assigns primary responsibility

for law enforcement and foreign affairs to the Executive Branch, not the judiciary. Yet the Ninth Circuit indulged the opposite presumption, reading grants of authority to the Executive parsimoniously to circumscribe that Branch's enforcement authority, while reading a limited grant of judicial authority broadly to encompass the power to review Executive action abroad.

More important, the Ninth Circuit's decision threatens the government's ability to conduct international law enforcement operations necessary to combat the flow of illegal drugs into the United States and ensure the safety of the Nation's citizens. Under the holding below, criminals hiding in countries unwilling or unable to apprehend them (including countries that will allow United States authorities to arrest the criminals) have a safe harbor from federal law enforcement. Notwithstanding respondent's unsupported protestations to the contrary, the decision casts a dangerous pall of uncertainty not merely over the DEA's authority but over that of the FBI and other agencies actively involved in law enforcement actions abroad, precisely when those efforts are most critical to the Nation's security.

A. The Decision Below Misapplies The Presumption Against Extraterritoriality And Invades Executive Authority

1. Respondent begins by defending the Ninth Circuit's decision as a "well-reasoned" judgment that "correctly" invokes the presumption against extraterritorial application of United States law. Br. in Opp. 1, 8. As respondent concedes, however, this case does not concern whether the relevant *substantive* criminal laws apply extraterritorially. It is undisputed that they do. Pet. 16; Pet. App. 36a (finding "no doubt that the substantive criminal statutes under which [respondent] was charged apply to acts occurring outside the United States"). The question is whether the statutory authority of federal agents under 21 U.S.C. 878 should be read to proscribe federal *enforcement* of those laws abroad. By its terms, Section 878(a)(3)(B) empowers DEA agents to make warrantless arrests on probable cause "for *any felony, cognizable under* the laws of the United States," without limiting where enforcement can occur. It thus is most

naturally read as granting the Executive Branch enforcement authority that extends at least as far as the laws it is charged with enforcing and wherever enforcement is deemed to be necessary and prudent. By contrast, respondent implausibly assumes that Congress, even as it enacted laws making conduct that occurs wholly outside the United States a felony, chose sweepingly to deny the agencies charged with enforcing those laws authority to act abroad, with or without foreign nation consent. Pet. App. 35a n.24 (rejecting the notion that DEA authority "rests on 'the consent or assistance of the host country'").

Defending that result, respondent declares that principles of national sovereignty and the need to avoid conflicts with foreign powers require Section 878 to be read as barring such enforcement activities. Br. in Opp. 1, 8-9. But that proves too much. Pet. 21 It violates neither international law nor the sovereignty of a foreign county for federal agents to arrest a suspect abroad *with* that foreign nation's public or confidential consent. *Ibid.* The Ninth Circuit nonetheless construed Section 878 to foreclose even those arrests, without explaining why Congress would have wanted to preclude such cooperation.[1] The Ninth Circuit's decision, moreover, is more likely to promote international conflict than avoid it. As respondent concedes, Br. in Opp. 12 n.4, 14-15, the United States' *armed forces* may be used to seize

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[1] Respondent's assertion that a "decision to search, seize, and/or remove a foreign national in a foreign country would constitute a direct violation of the sovereignty of a foreign country," Br. in Opp. 11, is thus inaccurate. Foreign nations can authorize actions that would otherwise violate their sovereignty. Respondent offers no reason why Congress would have wanted to foreclose foreign nations from pursuing that course. Respondent's reliance (Br. in Opp. 8) on dictum from *In re Ross*, 140 U.S. 453, 464 (1891), is similarly misplaced. In that case, this Court recognized that federal officers not only could arrest outside the United States but that they also could conduct trials there. That case, moreover, concerned the arrest of a United States seaman for committing murder on board a military vessel docked in Japan, and the authority to make the arrest was unquestioned. Respondent's similar reliance (Br. in Opp. 8) on Justice Story's observation that "no state or nation can, by its laws, * * * bind persons not resident therein," is also misplaced. Congress has enacted numerous statutes proscribing conduct abroad, the validity of which is not disputed.

criminals hiding abroad. See Pet. App. 3a; *id.* at 81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a (Gould, J., dissenting). The suggestion that Congress sought to avoid international conflict by promoting military incursions over law enforcement actions strains credulity. See Pet. 22.

2. The Constitution charges the Executive Branch with the duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and makes "foreign policy" that Branch's "province and responsibility," *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988); Pet. 21. It is unnatural to read Section 878 as limiting the Executive's exercise of those responsibilities. Instead, Section 878's authority to arrest for *any* felony is best read to grant broad arrest authority to federal officers, while leaving case-specific decisions regarding where and when to enforce the law, and determinations of when, whether, and how to obtain (or what constitutes) a foreign Nation's consent, to the Executive Branch. Pet. 20-21; Pet. App. 101a, 107a-108a (O'Scannlain, J., dissenting). The Executive must have the ability to respond to "[s]ituations threatening to important American interests [that] may arise half-way around the globe." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990). Neither respondent nor the Ninth Circuit have offered a compelling reason to read Section 878 as limiting rather than promoting that ability. The legislative record makes it clear that Congress both was aware of crime's international dimension, and that it sought to provide the Executive with correspondingly broad enforcement authority through "flexibility in the utilization of enforcement personnel *wherever and whenever the need arises*." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 54 (1970) (emphasis added); see Pet. 19.[2]

As this Court explained in *United States* v. *Bowman*, 260 U.S. 94, 98 (1922), the presumption against extraterritoriality has no application to "criminal statutes which are, as a class, not logi-

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[2] Respondent's effort to distinguish that language (see Br. in Opp. 13 n.5) as "generic" is unconvincing given Congress's specific acknowledgment that crime, and drug crimes in particular, are international in scope.

cally dependent on their locality." Where, as here, Congress enacts criminal laws that expressly apply abroad and charges Executive Branch agencies with enforcement, that authority is not logically limited by location. If a violation is no less a felony when committed abroad, the DEA's authority to make arrests for that violation should not be confined. Nor does the government's interest in enforcement terminate once a suspect who, having committed crimes here, flees abroad. See Pet. 18-19.

Respondent nonetheless argues (Br. in Opp. 8-9 & n.1) that the *Bowman* principle is limited to substantive criminal prohibitions and cannot be applied to statutes authorizing enforcement. But that contention is flawed at several levels. First, because the DEA's arrest authority is defined by reference to substantive criminal law (*i.e.*, "any felony"), it is artificial to draw respondent's distinction between substantive law and enforcement authority. Congress tied the two together. Second, the very cases cited by respondent refute his contention. In *Maul* v. *United States*, 274 U.S. 501, 510-511 (1927), this Court invoked *Bowman* to construe an ambiguous statute to authorize extraterritorial enforcement. In that case, revenue cutters—customs enforcement vessels—had been assigned to particular "districts" in United States waters, 274 U.S. at 509-510, and Congress had reflected that practice by authorizing Revenue Cutter Officers to make certain seizures "as well without as within their respective districts," *id.* at 510. The Court agreed that the statutory language might be read as authorizing seizures only "within other customs districts" and thus to exclude extraterritorial seizures in "the sea outside customs districts." *Id.* at 510-511. But the Court rejected that construction. If vessels "violating the revenue laws * * * could escape seizure by departing from or avoiding waters within customs districts, the liability * * * would be of little practical effect in checking violations, and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." *Id.* at 511. Citing *Bowman* (and not the rule against extraterritoriality), the Court thus upheld extraterritorial seizure authority. *Ibid.* Justice Brandeis (joined

by Justice Holmes) similarly observed: "If the officers of revenue cutters were without authority to seize American merchant vessels found violating our laws on the high seas beyond the twelve-mile limit, or to seize such vessels found there which are known theretofore to have violated our laws without or within those limits," then "many offenses against our laws might, to that extent, be committed with impunity." 274 U.S. at 520 (Brandeis, J. concurring).[3]

The same reasoning applies here. If criminals who violate federal law in this country, and criminals who violate federal law applicable to conduct abroad, could "escape seizure by departing from or avoiding" the territory of the United States, those criminal laws "would be of little practical effect * * *, and it is most improbable that Congress intended to leave the avenues of escape thus unguarded." 274 U.S. at 511. Certainly such limits on enforcement authority are not "lightly to be assumed," *id.* at 525 (Brandeis, J., concurring), particularly in view of the Executive Branch's constitutional obligation to "take Care that the Laws be faithfully executed," and its primacy in matters of international relations. By reading limits on that Branch's constitutional authority into a federal statute that does not itself impose them, the Ninth Circuit exceeded the judicial function.

B. The Ninth Circuit's Decision Hinders Critical International Law Enforcement Activities

Disputing the significance of the Ninth Circuit's en banc decision, respondent argues that it does not affect "the authority of any U.S. agency other than the [DEA]." Br. in Opp. 3; see *id.* at 2, 4, 7. That effort at minimization ignores the DEA's important international efforts to combat the flow of drugs into the United States and international drug cartels. It was, after all, an effort to determine the scope of the DEA's knowledge that led the members of one such cartel to kidnap, torture, and murder DEA

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[3] Noting that the arrest power of peace officers was not "conferred originally by statute" but was "thought to inhere in these officers, except in so far as they may be limited by statute," Justices Brandeis and Holmes found extraterritorial seizure authority unquestionable. 274 U.S. at 524 & n.27.

agent Enrique Camarena-Salazar in Mexico. Those actions triggered respondent's arrest and prosecution, and ultimately this lawsuit. The impact on the DEA's authority is itself sufficient to justify this Court's review.

Respondent, in any event, nowhere distinguishes the FBI's arrest authority, or that of any other law enforcement agency. Pet. 17, 23-24. Respondent thus does not dispute that the Ninth Circuit rejected the very analysis adopted by the Justice Department's Office of Legal Counsel to uphold the extraterritorial law enforcement authority of the FBI. Pet. 24. Thus, precisely at the moment when the international law enforcement activities of the FBI and other agencies are most critical, the Ninth Circuit's decision casts doubt on their legality.[4]

Respondent's repeated assertion (Br. in Opp. 1, 2, 3, 7, 15, 16) that the decision will have little effect on international law enforcement initiatives, including efforts to preserve national security and combat terrorism, is largely premised on the option of military force. But law enforcement agents, in addition to the armed forces, are critical international law enforcement tools that should be available to the President. See, *e.g.*, Pet. 24 & n.9 (noting seizure of Mir Aimal Kasi in Pakistan by FBI agents). The Executive Branch should not be left with an all or nothing choice, but should have non-military options that are more likely to be acceptable to and accepted by foreign countries. See Pet.

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[4] Respondent likewise errs in repeatedly attempting to dismiss this case as involving decisions by "low-level" officials. Br. in Opp. 2, 3, 4, 5, 12. A decision of the DEA Deputy Administrator (a presidential appointee and the number two person in that agency) cannot be dismissed as "low-level." Respondent, furthermore, nowhere asserts that the result would be different if higher level authorization had been granted. The Ninth Circuit majority expressly held that the DEA lacks statutory authority for arrest outside the United States, without regard to such authorization, and the statutes at issue here confer no greater arrest authority on DEA agents when the arrest is approved by the Attorney General than when it is approved by the DEA's Deputy Administrator. See Pet. 23 n.8. The contrary view, moreover, would require federal courts to engage in the dubious enterprise of investigating executive decision-making in the sensitive area of foreign affairs and enforcing judicially developed distinctions among various federal officers.

22, 25-26.[5] In delicate matters of international affairs, and especially in the current environment, the Executive must have available and be able to choose an approach that best balances foreign policy and law enforcement objectives.[6]

C. The Ninth Circuit's Decision Defies An Express Limit On Jurisdiction

Finally, respondent nowhere disputes that the Ninth Circuit, even as it narrowly construed the Executive Branch's authority to enforce the law outside this country, broadly construed its own authority to review such extraterritorial conduct under the FTCA. Nor does respondent dispute that the Ninth Circuit did so despite the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k)—a limit on a waiver of sovereign immunity that must be construed strictly in favor of the United States. See Pet. 26.

Instead, respondent argues that the Ninth Circuit's decision is correct under the judicially developed "headquarters doctrine," which allows federal courts to offer redress for *conduct* that

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[5] Respondent also asserts that the Executive Branch may employ "extradition requests" or "joint law enforcement efforts" with foreign countries. Br. in Opp. 12 n.4. But that merely illustrates the extraordinary effect of the Ninth Circuit's decision. As this Court has observed, "[s]ome who violate our laws may live outside our borders under a regime quite different from that which obtains in this country"—including countries that may have no effective government at all, or regimes sympathetic to United States interests but unwilling to engage in enforcement efforts themselves. *Verdugo-Urquidez*, 494 U.S. at 275. Under the Ninth Circuit's view, criminals hiding in those countries have a safe harbor from all but the use of military force. Although respondent proposes that the Coast Guard effect the seizures, respondent does not assert that the Coast Guard has the necessary expertise, and cites no statute expressly authorizing the Coast Guard to operate on dry land inside the territory of foreign nations, as respondent would require. Respondent's proposal, moreover, would make an arrest's legality turn on the agency to which it is charged, and would embroil the federal courts in difficult distinctions among military, national security, and law enforcement activities. See Pet. 22 n.6.

[6] Respondent's related assertion (Br. in Opp. 14-15) that "there are cases currently in litigation" that more directly "raise" these issues is incorrect. None of the cited cases concern the ability of law enforcement agencies to seize criminals abroad.

takes place in the United States even if the resulting "injuries occur[] in foreign countries." Br. in Opp. 17-18. But that doctrine has never been adopted by this Court and, at least as applied here, robs the express foreign country exception of all force.[7] In this case, the allegedly tortious *conduct*, respondent's arrest, took place in Mexico. The only reason that arrest—the seizure of an indicted suspect on probable cause—was deemed "false" and thus actionable was that it took place abroad and not in the United States. And, for the same reason, liability began with respondent's seizure in Mexico and ended once he moved across the border into the United States. See Pet. 26, 27-28. Respondent cites no case for the extraordinary proposition that the FTCA exception for claims "arising in a foreign country" is inapplicable where the allegedly tortious conduct occurs abroad, where damages accrue only while that conduct continues abroad, and where the only reason the conduct is tortious is that it occurred abroad. The decision effectively reads the foreign country exclusion out of the statute.

Further, as this Court explained in *United States* v. *Spelar*, 338 U.S. 217, 221 (1949), one reason Congress enacted the foreign country exception was to prevent the United States from being subject "to liabilities depending upon the laws of a foreign power." The Ninth Circuit's decision thus transgresses both the literal limits of the foreign country exception and its purpose, since liability is premised on the arrest's inconsistency with *Mexican* law and sovereignty. Respondent, in addition, does not dispute that the Ninth Circuit improperly denied federal officers authority to make citizen arrests on probable cause when acting without official authority, even though ordinary citizens (who similarly act without official authority) can make citizen arrests. Pet. 28 n.12. And the court of appeals' expansive construction of its own authority under the FTCA (and under the Alien Tort

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[7] Although respondent cites *Richards* v. *United States*, 369 U.S. 1 (1962), *Richards* did not concern the foreign country exclusion. The question in *Richards* was which State's laws (including choice of law rules) should apply to a plane crash in Missouri where the negligence occurred elsewhere.

Statute at issue in *Sosa* v. *Alvarez-Machain*, No. 03-339), placed that court squarely where federal courts do not belong—in the realm of international politics, adjudicating the propriety of Executive conduct abroad.[5]

Finally, respondent suggests that this case merely involves "monetary recoveries" or "damages" that will not affect law enforcement activities. Br. in Opp. 2, 16; see *id.* at 19, 20 (decision does not alter "any policy decision" but "merely requir[es] that [respondent] be compensated"). Although this case arises from a request for damages, the en banc decision expressly holds that DEA agents act illegally if they engage in law enforcement activities beyond this Nation's borders. That principle cannot easily be cabined to damages actions. Law enforcement officials charged with faithful execution of the Nation's laws ought not be required to choose between exercising their authority to protect this Nation's citizens from criminals abroad and fidelity to a federal appellate court's en banc decision. This Court's cases, in any event, recognize that the threat of damages actions will deter individual officers, see *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001), and the United States should not be tethered to a pay-as-you-go system for the conduct of law enforcement and foreign policy, especially when both arrest authority and the FTCA's inapplicability are clear.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2003

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[5] Because the petition in this case and in No. 03-339 raise one question in common, together with several exceedingly important and complex questions concerning distinct statutory regimes, the Court should consider granting both petitions and setting the cases for consecutive arguments on the same day.